

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

State of Ohio,	:	Case No. 26CA1240
Plaintiff-Appellant,	:	<u>DECISION AND</u>
v.	:	<u>JUDGMENT ENTRY</u>
Jordan Comer,	:	
Defendant-Appellee.	:	RELEASED 10/13/2026

APPEARANCES:

Ariana Bowles Norris, Adams County Prosecuting Attorney, and Sean M. Donovan, Asst. Prosecuting Attorney, West Union, Ohio, for appellant.

Randall L. Porter, Assistant State Public Defender, Columbus, Ohio, for appellee.

Hess, J.

{¶1} The State of Ohio appeals an order of the Adams County Common Pleas Court dismissing three counts of an indictment against Jordan Comer with prejudice. The State presents one assignment of error asserting that “[a]bsent a specific finding defendant was denied a constitutional or statutory right, the trial court lacked authority to dismiss counts 1, 2, and 3 of the indictment with prejudice.” For the reasons which follow, we overrule the assignment of error and affirm the trial court’s judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶2} On August 29, 2024, Comer was indicted on three counts: (1) Count 1, murder with a firearm specification; (2) Count 2, complicity to commit aggravated robbery with a firearm specification; and (3) Count 3, aggravated robbery with a firearm specification. Comer pleaded not guilty to the charges, and the matter was scheduled for a jury trial. However, shortly before trial, defense counsel withdrew, and the trial court appointed new counsel for Comer and rescheduled the trial. Comer later moved for a continuance, and the court rescheduled the trial again for December 8-12, 2025.

{¶3} On November 25, 2025, the court conducted a status conference during which the assistant prosecutor told the court that he believed the grand jury had just indicted Comer on five additional charges. The assistant prosecutor acknowledged that the previous week, he told defense counsel there would be no new charges because the prosecutor said they could not get a grand jury in time to indict them. However, they got a grand jury earlier that day. The assistant prosecutor indicated most of the new evidence which formed the basis for the new charges came from a proffer by an alleged co-defendant in August. The assistant prosecutor told the court the new charges could not be tried separately from the original charges “because of double jeopardy,” but the court indicated it would still proceed to trial on the original charges and set the new charges for a separate trial. The court explained that it seemed to it that there had been dereliction of duty by the State, and any potential double jeopardy issue “was known when the State of Ohio elected to sit on the evidence”

{¶4} On December 1, 2025, a supplemental indictment was filed charging Comer with five additional counts: (1) Count 4, aggravated murder with a firearm specification;

(2) Count 5, murder with a firearm specification; (3) Count 6, improperly discharging a firearm at or into a habitation or a school safety zone with a firearm specification; (4) Count 7, murder with a firearm specification; and (5) Count 8, felonious assault with a firearm specification. The prosecutor filed a request asking the clerk of courts to issue a summons. The next day, a notation was made on the docket indicating an arraignment hearing was scheduled for December 12, 2025, at 3:00 p.m., and a deputy clerk issued a summons on supplemental indictment on behalf of the clerk of courts, commanding the sheriff or any other authorized law enforcement officer to summon Comer to appear before the court on December 12, 2025, at 3:00 p.m.

{¶5} On December 4, 2025, the State filed a motion to advance arraignment on superseding indictments¹ or in the alternative to continue the trial. The same day, the State filed a motion for leave to appeal under R.C. 2945.67(A), which permits a prosecuting attorney to appeal by leave of the court to which the appeal is taken any decision in a criminal case except one which the prosecutor may appeal as a matter of right and the final verdict. The State asked this court for leave to appeal the “decision setting the supplemental indictments both for arraignment after the start of the jury trial as well as to set the supplemental indictments for a separate trial.” Concurrent with its motion, the State also filed a notice of appeal stating it was “appealing the judgment rendered and entered on December 2, 2025, in conjunction with the oral rulings from November 25, 2025.” However, pursuant to App.R. 11(D), the docketing of the appeal by the clerk of this court was conditional and subject to leave to appeal being granted by this court.

¹ The State used the phrase “superseding indictments” even though the new indictment stated it was a supplemental indictment.

{¶6} On December 5, 2025, the trial court denied the State’s motion to advance arraignment on superseding indictments or in the alternative to continue the trial. On December 8, 2025, the State filed a “motion for leave nolle prosequi” asking the court “to enter a Nolle Prosequi, without prejudice, to counts 1, 2, and 3 of the indictment in this matter.” The State asserted that once trial began on those charges, it would be constitutionally barred from proceeding to trial on the new charges and that the interests of justice required it pursue the more serious new charges.

{¶7} That same morning, the court conducted a hearing on the motion instead of the scheduled jury trial. Defense counsel asked that if the court granted the State’s motion, the dismissal be with prejudice. When asked, “What authority do you feel the court has to demand that it’s with prejudice?” defense counsel stated, “Well, I think at this point, even if they would bring these charges back, speedy trial would stop them.” Defense counsel also argued that the new charges were barred on speedy trial grounds. The assistant prosecutor asserted that the State had 201 days of speedy trial time left. Defense counsel also suggested it would be unjust to grant a dismissal without prejudice. Then, the following exchange occurred:

COURT: So, if I understand, the State of Ohio has stated – I want to make sure unambiguously I understand. The State of Ohio says, we’ve approached this with the victims. They want to proceed on counts 4, 5, 6, 7, and 8 versus that of 1, 2, and 3.

[ASST. PROSECUTOR]: Yes, Your Honor.

COURT: Very well. So what would – so it should be dismissed with prejudice then?

[ASST. PROSECUTOR]: We’re asking it to be without, but –

COURT: Well, again, can – at some point in time in this proceeding, could the State maybe provide a reason for these things?

[ASST. PROSECUTOR]: Well, the without is – we’re allowed to by the law, and that’s what we’re requesting. I’m sure –

COURT: Are you ready to go forward with trial if I don’t grant this?

[ASST. PROSECUTOR]: Yes.

COURT: You are?

[ASST. PROSECUTOR]: Yes, but I would prefer to go after 4, 5, 6, 7, and 8 as requested. I have to choose between them. I would prefer, as well as the victims, that we proceed after 4, 5, 6, 7, and 8. I believe at this stage the only choice we have is to dismiss 1, 2, and 3, so that I can pursue 4, 5, 6, 7, and 8, and that’s my desire. I have no intention of going after 1, 2, and 3. However, I’m not asking that they be dismissed with prejudice. If the court does that, the court [sic].

COURT: No prejudice to you?

[ASST. PROSECUTOR]: No.

COURT: To the State or the victims?

[ASST. PROSECUTOR]: Correct.

COURT: All right. So, with that statement then, counts 1, 2, and 3 shall be dismissed with prejudice.

{¶18} Later, the court said, “So, the counts 1, 2, and 3 are not laid with prejudice [sic].” Defense counsel said, “Okay,” and the court said, “Based upon your request and also the State’s suggestion that it is not prejudicial to them in any manner to dismiss with prejudice counts 1, 2, and 3.” The court also stated, “So, the court is executing the order, and it will be with prejudice as has been suggested by counsel, with no prejudicial effect to the State.” That same day, the court issued an order stating, “The Court accepts the Nolle Prosequi, as to counts 1, 2, and 3, entered by the State of Ohio and Orders that this matter is dismissed, with prejudice, upon the request of the State of Ohio.” On the order,

the word “with” is handwritten, replacing the typewritten word “without,” which has been crossed out.

{¶9} On December 9, 2025, the court issued an entry stating that the State filed a motion to nolle Counts 1, 2, and 3 without prejudice and that “[p]ursuant to arguments made by both counsel, the State advised dismissal of the original three (3) indictments with prejudice would have no prejudicial affect [sic] upon the State’s desire to proceed on the most recent five (5) count indictment filed on December 1, 2025.” The entry also set a deadline for briefs regarding the new charges and their effect on Comer’s speedy trial rights and reiterated that arraignment on the new charges would be December 12, 2025, at 3:00 p.m. Also on December 9, 2025, the State moved this court to dismiss its appeal.

{¶10} On December 11, 2025, the State filed its speedy trial brief, and Comer filed a motion to dismiss the supplemental indictment on speedy trial grounds. At the December 12, 2025 hearing, defense counsel asked the court to rule on the speedy trial issue before it arraigned Comer on the new charges. Defense counsel also argued that the trial court should dismiss the supplemental indictment on double jeopardy grounds. Defense counsel stated, “It was dismissed with prejudice. The State okayed that.” Defense counsel asserted that the new charges were “allied charges of similar import.” The court did not proceed with the arraignment that day and instead gave the parties time for additional briefing.

{¶11} On January 5, 2026, we granted the State’s motion to dismiss its appeal, which was essentially a motion to withdraw the not yet ruled upon motion for leave to appeal. Two days later, the State filed a notice of appeal from the December 8, 2025 dismissal order pursuant to R.C. 2945.67(A), which allows a prosecuting attorney to

appeal as a matter of right a decision granting a motion to dismiss all or any part of an indictment.

II. ASSIGNMENT OF ERROR

{¶12} The State presents one assignment of error: “Absent a specific finding defendant was denied a constitutional or statutory right, the trial court lacked authority to dismiss counts 1, 2, and 3 of the indictment with prejudice.”

III. LAW AND ANALYSIS

{¶13} In the sole assignment of error, the State contends that the trial court lacked authority to dismiss Counts 1, 2, and 3 of the indictment with prejudice absent a specific finding that Comer was denied a constitutional or statutory right. The State asserts that abuse of discretion review applies to a trial court’s decision on a motion to dismiss an indictment. The State further asserts that the Supreme Court of Ohio has stated that Crim.R. 48(B) does not give a trial court authority or discretion to dismiss an indictment with prejudice unless the defendant has suffered a violation of constitutional or statutory rights which would, in and of itself, bar further prosecution. Therefore, a court abuses its discretion if it dismisses an indictment with prejudice when nothing indicates such a violation occurred. The State maintains that the trial court made no finding of any statutory or constitutional violation and made it clear that it was dismissing the original counts with prejudice because it believed the State would not be prejudiced by that decision. The State asserts that whether it was prejudiced by the dismissal “is irrelevant to the court’s authority to dismiss the counts with prejudice.” Therefore, the trial court abused its discretion when it dismissed the counts with prejudice, and we should reverse its

judgment and remand with instructions for it to dismiss Counts 1, 2, and 3 without prejudice.

{¶14} Comer contends the State invited the alleged error because it “agreed to the trial court’s entry dismissing counts 1-3 with prejudice.” Comer also contends that the State did not object to the dismissal with prejudice, and “[f]or the State to demonstrate plain error, it would have to abandon the position that it took in the trial court, that the dismissal entry did not prejudice the State.” Comer claims “[t]he State is judicially estopped from now advancing the contrary position.” Finally, Comer contends that the trial court had authority to dismiss the charges in the interests of justice, which is exactly what the court did.

{¶15} The State did not invite the alleged error in dismissal of the original counts with prejudice. “The doctrine of invited error specifies that a litigant may not ‘take advantage of an error which he himself invited or induced.’” *State v. Garrett*, 2022-Ohio-4218, ¶ 203, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20 (1986), paragraph one of the syllabus. For the doctrine to apply, the complaining party “must have been “actively responsible” for the trial court’s error.” *State v. McAlpin*, 2022-Ohio-1567, ¶ 220, quoting *State v. Campbell*, 90 Ohio St.3d 320, 324 (2000), quoting *State v. Kollar*, 93 Ohio St. 89, 91 (1915). The Supreme Court “has found invited error when a party has asked the court to take some action later claimed to be erroneous, or affirmatively consented to a procedure the trial judge proposed.” *Garrett* at ¶ 203, quoting *Campbell* at 324. “[M]ere “acquiescence in the trial judge’s erroneous conclusion” will not support a finding of invited error.” *McAlpin* at ¶ 220, quoting *Campbell* at 324, quoting *Carrothers v. Hunter*, 23 Ohio St.2d 99, 103

(1970). Although the State indicated at the December 8, 2025 hearing that it would not be prejudiced if the court dismissed the original charges with prejudice, contrary to what the entry from that date suggests, the State never requested that the court dismiss them with prejudice or affirmatively consented to the court doing so.

{¶16} We do, however, conclude that plain error review applies. “In general, appellate courts review a trial court’s decision regarding a motion to dismiss an indictment for an abuse of discretion.” *State v. Wagner*, 2026-Ohio-362, ¶ 20 (4th Dist.), citing *State v. Troisi*, 2022-Ohio-3582, ¶ 17, citing *State v. Keenan*, 2015-Ohio-2484, ¶ 7. But at the trial level, the State did not object to the dismissal with prejudice or argue that the trial court lacked authority to enter a dismissal with prejudice unless it found Comer was denied a constitutional or statutory right. “It is well-settled that a party may not raise new issues or legal theories for the first time on appeal.” *State v. Blair*, 2025-Ohio-4898, ¶ 15 (4th Dist.), quoting *In re B.S.*, 2024-Ohio-5183, ¶ 74 (4th Dist.), citing *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43 (1975). “Thus, a litigant who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal.” *Id.*, quoting *In re B.S.* at ¶ 74, citing *Independence v. Office of the Cuyahoga Cty. Executive*, 2014-Ohio-4650, ¶ 30.

{¶17} “Appellate courts may, however, in certain circumstances, consider a forfeited argument using a plain-error analysis.” *Id.*, quoting *In re B.S.* at ¶ 75, citing *Risner v. Ohio Dept. of Nat. Resources*, 2015-Ohio-3731, ¶ 27. Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” A party asserting plain error must demonstrate that an error occurred, that it was obvious, and that there is a reasonable

probability it resulted in prejudice, meaning it affected the outcome of the proceeding. See *State v. Echols*, 2024-Ohio-5088, ¶ 50. “Plain error should be noticed only “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”” *Id.*, quoting *State v. Clayton*, 62 Ohio St.2d 45, 47 (1980), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶18} The State does not assert plain error on appeal or address Comer’s arguments regarding its concession that a dismissal with prejudice would not prejudice it. We decline to construct a plain error argument on the State’s behalf. See *Blair* at ¶ 15, citing *State v. Dodd*, 2022-Ohio-4455, ¶ 19 (4th Dist.) (declining to construct plain error argument on an appellant’s behalf). Accordingly, we overrule the sole assignment of error and affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period set forth in the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 22, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.